

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT

DRAFT Meeting Summary - Open Session

Friday, January 4, 2002, 9:30 a.m.

MEMBERS PRESENT: Harry Sondheim (Chair); Karen Betzner; Linda Foy; JoElla Julien; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Mark Tuft; Paul Vapnek; Anthonie Voogd

MEMBERS ATTENDING BY TELEPHONE: Stanley Lamport; Jerome Sapiro, Jr.

ALSO PRESENT: Richard Flamm (Alameda County Bar Association member); Kevin Mohr (COPRAC Vice-Chair and Professor of Law); Ira Spiro (Liaison from the State Bar ADR Committee); and Randall Difuntorum, Robert Hawley, Mary Yen (State Bar staff)

I. APPROVAL OF ACTION SUMMARY FROM OCTOBER 30, 2001 MEETING

The Meeting Summary from the October 30, 2001 meeting was approved.

II. REMARKS OF CHAIR

A. Schedule of Meetings

Mr. Sondheim noted the meeting scheduled for Sunday, March 17, 2002, will be held in Oakland, not in Sonoma.

B. Selection of Consultant Researcher

The Commission went into Closed Session for this item.

C. Vice-Chair Position

Commission members who are interested in serving as vice-chair should notify Randall Difuntorum by January 25, 2002.

III. MATTERS FOR ACTION

A. Rule 1-100/Function and Philosophy of the Rules of Professional Conduct

The Chair introduced this topic by narrowing the issues to four categories: 1) the purpose of the Rules of Professional Conduct, 2) what values should be reflected in the Rules of Professional Conduct, 3) what will be the organization and numbering of the Rules of Professional Conduct, and 4) what will be the scope of the Rules of Professional Conduct. During the discussion there were several recurrent comments: that the rules ought to be for discipline only; that the Rules ought to provide regulation and guidance in addition to being for discipline; and that the Rules ought not to be aspirational or a code of conduct.

With a focus on categories 1) and 4), the following points were made during the discussion:

The purpose of each Rule of Professional Conduct should be considered, Rule by Rule.

California's Rules of Professional Conduct are more consumer and client protection oriented than the ABA's Model Rules. Any recommendation to change the Rules of Professional Conduct to be more like the ABA's rules should be explained in detail.

California's Rules of Professional Conduct are more focused than the ABA rules. The Commission should focus on the rules as being discipline rules, less as being aspirational.

California's Rules of Professional Conduct are used by the judiciary for disqualification and legal malpractice cases because there is no other a body of jurisprudence for these issues. California courts have been using, and will continue to use, the Rules of Professional Conduct in matters brought before them.

The Rules of Professional Conduct should be more than disciplinary rules. They should be parameters in which the profession of law is administered in our system of justice. They are the laws by which attorneys practice law. They should not be aspirational.

The Rules of Professional Conduct should be the basis for discipline. They could also provide duties that guide the daily conduct of attorneys.

The Commission could begin with an approach that these are rules of discipline, with a presumption that deviation would be possible, depending on the particular Rule of Professional Conduct.

The main use of the Rules of Professional Conduct is outside of discipline.

It may not be possible to identifying an overarching purpose at the outset. It may be appropriate to ask, for each Rule, what is its purpose, why is it there?

Although the primary purpose for the Rules is discipline, the Rules of Professional Conduct are used in different contexts.

As the Commission drafts the Rules of Professional Conduct, it should keep in mind what it perceives to be the role of the attorney. The way in which each Rule is drafted will reflect the Commission's concept of the attorney's role. The Rules should be drafted as rules of discipline, with the assumption that the Rules will be used by courts in civil and criminal cases.

Each revision of the Rules has brought longer, more detailed Rules. However, the more detailed the Rule, the easier it is to get around it. Fatter rules catch more people. The Commission should not draft ultra

specific Rules of Professional Conduct. Less is more. The Rules should be for discipline. The litmus test for each Rule drafted should be - "should a lawyer be subject to discipline for violation of this Rule?"

The Commission's charge from the Board of Governors sets the limit of the focus of the Commission. A Code of Conduct is not in the charge. The Commission should start with these being rules of discipline, and whether the Commission will deviate from this can be considered as the Commission proceeds or at the end.

The Rules of Professional Conduct should be made more easily understood and provide guidance. Codes of Conduct are unenforceable.

There needs to be a place outside of the Rules of Professional Conduct for guidance rules that do not serve a disciplinary function.

How will the Rules of Professional Conduct affect attorneys who act as neutrals or arbitrators? Private ADRs perform a quasi judicial function outside the system.

If the Commission intends to consider the viability of each Rule of Professional Conduct, this should be made part of the Commission's process for tracking purposes.

The current Rules of Professional Conduct are not adequate for the practice of law. The litmus test should be - "should a lawyer be subject to discipline for violation of this Rule?" Beyond that, the Rules can provide guidance for attorneys. The Commission should consider recommending some rules for certain practice areas that do not apply across the board to all practice areas. This has already been done to some extent for litigators.

The litmus test of "should a lawyer be subject to discipline for violation of this Rule?" does not meet a reality check for some of the current Rules of Professional Conduct. The litmus test should be "Is this Rule enforceable?" The Rules of Professional Conduct are viewed as being barriers to the practice of law, as rules for punishing bad attorneys.

The Commission should retain the concept of "studied but rejected". This was utilized previously, and was helpful.

The authority of the Supreme Court is in the regulation and discipline of attorneys. The Commission should keep in mind the purpose of the Rules of Professional Conduct derives from the Supreme Court's authority.

Disciplinary, regulatory, and advisory functions are not necessarily exclusive of each other. The litmus test of "should a lawyer be subject to discipline for violation of this rule?" does not mean a Rule could not be used for regulatory or advisory purposes. The fact that some Rules of Professional Conduct have not served as the basis for discipline does not

mean the Rule has no disciplinary purpose. A Rule that has not resulted in discipline may be serving the function of providing guidance.

After discussion, it was the consensus for the Commission to have in mind the comments made at this meeting, and to move forward with the task of conducting a comprehensive evaluation of the Rules of Professional Conduct considering developments in the attorney professional responsibility field since the last comprehensive revision of the Rules in 1989 and 1992, and to recommend amendments.

By vote, the Commission determined it will proceed seriatim through the Rules of Professional Conduct, beginning with Rule 1-110 and leaving Rule 1-100 for a later date since it addresses purpose, function and scope. ABA Model Rules and other materials will be incorporated by the Consultant Researcher at appropriate places. After going through the Rules of Professional Conduct, the Commission will see if anything was not considered that ought to be considered.

B. Public Comment Outreach Planning

The public comment outreach is in process for suggestions on what changes to the Rule of Professional Conduct should be studied. It has been sent to a list of organizations, groups and people. Also, the Chair has written an article that appears in the January 2002 publication of the *California Bar Journal*. Commission members offered to assist in getting the Chair's article published in local Bar publications. Mr. Vapnek noted that the Bar Association of San Francisco's Ethics Committee will be providing comment.

IV. REPORTS OF THE COMMISSION MONITORS

A. ABA Ethics 2000

Mr. Sondheim, Mr. Tuft, and Mr. Lamport will attend the ABA's meeting in Philadelphia. Professor Mohr will also be in attendance.

B. State Bar Task Force on Multidisciplinary Practice

The ABA's midyear meeting has a couple of resolutions re MDPs on the Agenda. The State Bar's task force has not set a meeting.

C. Supreme Court Advisory Task Force on Multijurisdictional Practice

The public comment period for the Supreme Court's interim report has closed.

D. Family and Juvenile Law Advisory Committee of the Judicial Council

There were no recent developments to report.

E. Pro Bono Subcommittee of the State Bar Standing Committee on the Delivery of Legal Services

In November 2001, the ProBono Subcommittee of the State Bar's Standing Committee on the Delivery of Legal Services submitted to COPRAC's chair a request for COPRAC to review a draft revised pro bono resolution. The ProBono Subcommittee linked the resolution to Business and Professions Code section 6068(h). COPRAC acknowledged that pro bono is a responsibility, but did not conclude that pro bono services should be made into a duty of attorneys.

F. Discreet Task Representation Committee of the State Bar Access to Justice Commission

The initial recommendations made by the Discreet Task Representation Committee were approved by the State Bar's Board of Governors on July 28, 2001. The report which contains the initial recommendations is out for public comment. Ms. Peck will report back on the Judicial Council's activities in this area.

G. Judicial Council's Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System - Working Group of the Civil and Small Claims Advisory Committee Alternative Dispute Resolution Subcommittee

The public comment period for the proposed rule of court for mediators closes on February 12, 2002. Mr. Spiro noted the proposed rule is not intended to be the basis for discipline, although the proposed rule does not say this. Mr. Difuntorum will carry this information to COPRAC. Mr. Sondheim noted that this Commission could also consider this issue at the appropriate time.

H. COPRAC AB 363 Subcommittee

It was noted that the historical record of the AB 363 study of the ethical duty of public attorneys reflects the fact that a Business and Professions Code section 6068(e) problem still exists for the attorney when a solution is sought through amendment of Rule of Professional Conduct 3-600. Mr. Sondheim will be at the January 11, 2002 video conference meeting of COPRAC when it considers this subject.

I. Joint Task Force of the Judicial Council and the State Bar on AB 2069

The joint task force will present a proposal for public comment to the Board of Governors in January 2002.